of a county. "Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, although the consequence may impair its use, are not such a taking within the meaning of the constitutional provision forbidding the taking of private property for public purposes without due compensation." *Cooley's Constitutional Limitations,* p. 542 and note.

Are complainants in such a case entirely remediless? It would seem not. The statute making it the duty of the board of county commissioners to erect a jail does not carry with it authority to so manage it as to create a nuisance, in the sense of injuries that do not necessarily flow from its proper use as a public function. But in such a case, the excessive acts are chargeable to the officers individually, and not to the corporation, called the county. In a proper case, if the sheriff or jailor did not use all the powers at their command in a reasonable effort to keep down the consequential injuries as much as possible, they might become personally liable in damages to the persons specially affected. If they show that they have used in good faith all the facilities at their command, they would have a good defense, otherwise not. The commissioners, in a proper case, after due notice, might also become liable if they persisted in retaining in office men notoriously unfit to discharge their duties. See *Board, etc. v. Allman,* 142 Ind. 573. Nor would it be necessary that there be any actual invasion of the complainant's property, a cutting off of light, or noxious odors. The shouting and cursing of the prisoners, their exposing themselves in view of the complainant's windows, no doubt affected her right of "privacy," a right which, while not recognized by Sir William Blackstone, springs from natural law, and which commentators of civil law claim has always existed. For a full discussion of this right, see *Pavesch v. New England Life Ins. Co.,* 122 Ga. 194, 69 L. R. A. 101; also *3rd Mich. Law Review,* 559.

INTERPRETATION OF "PURE FOOD" STATUTES—INTENT AS AN ELEMENT OF OFFENSE.

In view of the efforts being made by state legislatures to protect their respective communities from deception in the purchase of food, it is gratifying to note that the trend of judicial decision in interpreting these acts is such that the real legislative intent is placed in operation. In *Groffe v. State,* 85 N. E. (Ind.) 769, decided in October, 1908, the defendant was convicted of the sale of oleomargarine for dairy butter. The conviction was under a

statute making it unlawful for any person to offer for sale or sell any adulterated or misbranded article of food, and on appeal the Supreme court held that the absence of guilty knowledge or intent upon the part of the defendant was immaterial, and although the sale was made by a clerk contrary to defendant's express instructions, the conviction should be sustained. Chief Justice Gilbert dissented.

For many years legislatures have passed these so-called pure food laws, and the general policy of the courts has been towards declaring that intent is not an ingredient in the crime. At one time in Indiana, however, it was thought that the prosecution had to show defendant's knowledge of the fact that the article of food was not as represented. *Schmidt v. The State,* 78 Ind. 41. The court relied upon the decision in *Commonwealth v. Boynton,* 12 Cush. 499, but the statute upon which the prosecution was based in that case expressly made knowledge a part of the crime, so the court was placed under the necessity of requiring proof of intent in order to satisfy the statute. *Schmidt v. The State* was decided by a divided court and has never been followed. In *State v. Engle,* 156 Ind. 339, it was held that if the act is made *malum prohibitum,* the voluntary doing of the act, regardless of the intent, constitutes the offense.

At common law only acts committed with an unlawful intent were criminal, but the complex social conditions which have arisen in the last fifty years, have made it necessary to change this rule to a certain extent. A man may commit an act which so far as the act itself is concerned may be above reproach, and yet the consequences may be extremely disastrous to the public-at-large. It is needless to attempt any justification of legislative enactments which tend to prevent such acts, for no one is bound to act unless he can do so lawfully, and it is perfectly reasonable for the legislature to say that if he acts in certain instances, he does so at his peril. *State v. Ryan,* 70 N. H. 196.

In *People v. Fulle,* 1 N. Y. Cr. R. 172, the court protested very strongly against the doctrine that it was not necessary to show intent in such cases, declaring that the only criminal case in which this quality may be absent is in a matter involving gross negligence. But, as the learned reporter observes in a note to this case, while sound principle would seem to support the view of the court, yet there are numerous cases to the contrary. The efficacy of such statutes would entirely be taken away were it incum-

bent on the prosecution to prove the dealer's intention to deceive, and the legislature's intention in almost every case would be frustrated. *People v. Kibler,* 106 N. Y. 321; *People v. Hillman,* 58 A. D. 571. As long ago as 1864, we find the courts of Massachusetts holding that where the statute does not require proof of unlawful intention, it need not be shown, for it is impracticable to prove that the seller of an article of food had knowledge of its defects, and that it is reasonable for him to take the risk of knowing its qualities. *Commonwealth v. Farren,* 9 Allen (Mass.) 489; *Commonwealth v. Nicholas,* 10 Allen (Mass.) 199.

There is no doubt but that this principle would not be applied in cases *malum in se,* or involving acts of a serious nature. But the evils against which it is sought to protect society, by these statutes, could not be avoided by the application of a more liberal rule. *State v. Rogers,* 95 Me. 94. Dealers in these products have many opportunities for informing themselves as to the real nature of the articles they are selling, and the cases are rare indeed, in which, by a reasonable amount of diligence, they could not be able to guard against selling spurious articles.

If the legislature is desirous of making proof of unlawful intention a condition precedent to conviction, there is no reason why it should not so express itself. But in the absence of any such expression on the part of the legislative body, the courts seem to be of the opinion that a condition of this kind may not be implied. *Waterbury v. Newton,* 50 N. J. L. 534; *Vandegrift v. Meihle,* 66 N. J. L. 92. Nor does it seem reasonable when the courts are called upon to construe these statutes, that they should cast unnecessary burdens upon the prosecution, for, as has already been indicated, it is practically impossible to show the intention of the seller of the article. After a large number of people have been injured by the consumption of an adulterated food, there is but little consolation in learning that the dealer unwittingly sold something he would not have sold had he been more cautious. *State v. Kelly,* 54 Ohio St. 166.

In *People v. Snowberger,* 113 Mich. 86, the court intimates that while legislation of this character may work a hardship, yet the remedy is with the legislature and not the courts. It is difficult, however, to see wherein the hardship lies, for the exercise of sufficient care on the part of the seller will always operate as a complete safeguard. It would work an extreme hardship on the consumer, however, if he were obliged to make extensive in-

quiries with every purchase to ascertain whether or not the food he buys is fit to be eaten. In a matter in which the public is so vitally interested, it should not be possible for scheming and fraudulent dealers to shelter themselves behind the plea of ignorance. The law imposes upon them the duty of knowing what they are selling and they should not be exculpated merely because they violate this duty.

The courts of Texas, contrary to the great weight of authority, still cling to the view that it is necessary to prove intent even where the statute does not require it. *Teaque v. State,* 25 Tex. App. 577. The question has been directly presented but once, however, and it seems probable that the next time it arises the Texas courts will adopt the prevailing view.

WAIVER OF CONDITION PRECEDENT.

The Court of Appeals of New York on November 10, 1908, rendered a most interesting decision in the case of *Clark v. West.* This was an action to recover on a written agreement entered into between two parties, by which the plaintiff was to write law books for the defendant, receiving two dollars per page during the progress of the work, and, if he abstained from the use of intoxicating liquors during the existence of the contract, he should, every six months after the publication of a book, receive a percentage of the net receipt of the sales, amounting, with what he had already received, to six dollars per page. The plaintiff completed the work to the satisfaction of the defendant after having complied with all the terms of the contract, with the exception of that of total abstinence, which the defendant knew had been violated, but nevertheless continued to exact full performance of all the other conditions, and repeatedly avowed, and represented to the plaintiff, that he was entitled to and would receive the royalty payment. The court held the stipulation with respect to the plaintiff's total abstinence was not of the consideration, or the subject matter of the contract, but an incident to the method of its performance, and might, therefore, be waived without any formal agreement to that effect based on a new consideration.

This case, rather unusual in its nature, seems undoubtedly to be properly decided, for as the court says: "The subject matter of the contract was the writing of the books," and the stipulation, in regard to the plaintiff receiving a greater sum in the event of